

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

SOLAE, LLC,
a Delaware limited liability company,

Plaintiff,

VS.

HERSHEY CANADA, INC.,
a Canadian corporation,

Defendant.

C.A. No. _____

JURY TRIAL DEMANDED

COMPLAINT

COMES NOW Plaintiff Solae, LLC (“Solae”), by and through its undersigned counsel, and for its Complaint against Defendant Hershey Canada, Inc. (“Hershey”) states as follows:

NATURE OF THIS ACTION

1. This is a civil action for declaratory relief, for breach of contract, and for associated relief. Plaintiff Solae seeks a determination of the parties' respective rights and obligations arising from the sale of two lots of lecithin manufactured by Solae for Hershey's use at its facility in Smith Falls, Ontario, Canada. Defendant Hershey has demanded of Solae full payment, irrespective of contract limitations, arising from Hershey's use of one lot of Solae lecithin allegedly contaminated with *Salmonella* and the alleged consequences of that use. Hershey has also wrongfully terminated its contract

of purchase and refused to pay for a second lot of lecithin manufactured and supplied at Hershey's request.

PARTIES

2. Plaintiff Solae is a Delaware limited liability company with its principal place of business in St. Louis, Missouri.

3. Defendant Hershey is a Canadian corporation with its principal place of business in Mississauga, Ontario.

JURISDICTION AND VENUE

4. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, in that this dispute arises in whole or in part under the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), to which both the United States and Canada are parties and signatories. This dispute thus presents federal questions within this Court's jurisdiction.

5. This Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a), in that this dispute is between a citizen of a state and a citizen of a foreign state, and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391.

7. This Court has personal jurisdiction over Hershey, as Hershey, among other things, agreed to a forum selection clause which governs the transactions at issue and which provides that courts of Delaware shall have exclusive jurisdiction over this dispute.

FACTS

8. Solae produces soy lecithin, a combination of phospholipids naturally occurring in soybeans that can be used in its natural state or refined for use in a variety of finished consumer goods. Food manufacturers and producers, such as Hershey, purchase lecithin for use as an emulsifier.

9. On or about June 21, 2006, in accordance with an established sales relationship, Hershey submitted an order to Solae for the purchase of a specific quantity of soy lecithin ("Lot 1"). A page of this order purports to contain terms and conditions. These purported terms and conditions specify that the Hershey order "is not a firm offer"

10. On or about June 22, 2006, Solae transmitted an order confirmation to Hershey, acknowledging receipt of the Hershey order for Lot 1 ("Lot 1 Order Confirmation"). The Solae Lot 1 Order Confirmation contains conditions of sale, setting forth the terms that would govern the transaction ("Conditions of Sale").

11. The Conditions of Sale specify that they "contain[] all of the terms and conditions with respect to the purchase and sale of the Products sold hereunder." Conditions of Sale, ¶ 18.

12. The Conditions of Sale prescribe conditions whereby its terms might be rejected or accepted. They provide: "Unless Buyer shall notify Seller in writing to the contrary as soon as practicable after receipt of this Agreement by Buyer, Buyer shall be deemed to have accepted the terms and conditions hereof and, in the absence of such

notification, Buyer's acceptance of the Products shall be equivalent to Buyer's assent to the terms and conditions hereof." Conditions of Sale, ¶ 18.

13. Solae received no such "writing to the contrary."

14. The Conditions of Sale specify, and limit, Solae's liability in the event of a breach or defect. Among other terms, they provide: "Buyer's exclusive and sole remedy for any claim shall be a refund of the amount of the purchase price paid for the product in respect of which damages are claimed, and in no event shall seller's liability for any claim be greater than that amount." Conditions of Sale, ¶ 4.

15. Solae processed Hershey's order of Lot 1. On or about June 27, 2006, Solae shipped Lot 1 from its facility in Gibson City, Illinois, to a Hershey facility in Smith Falls, Ontario.

16. Included with Solae's shipment of Lot 1 was an invoice, again containing the Conditions of Sale.

17. Hershey accepted the shipment of Lot 1 and rendered payment in full, and without objection to or rejection of the Conditions of Sale.

18. On or about October 17, 2006, Hershey submitted an order to Solae for purchase of a second lot soy lecithin ("Lot 2").

19. On or about October 18, 2006, Solae transmitted an order confirmation to Hershey, acknowledging receipt of the Hershey order for Lot 2 ("Lot 2 Order Confirmation"). The Lot 2 Order Confirmation contained the Conditions of Sale.

20. The purchase price of Lot 1 and Lot 2 combined totals in excess of \$75,000.

21. On or about November 13, 2006, Solae received word from Hershey that *Salmonella* had been discovered at Hershey's Smith Falls facility, resulting in shutdown of production and a product recall. Hershey asserted that the Lot 1 lecithin acquired from Solae was the source of the *Salmonella*, and that Hershey would "hold Solae responsible for all losses suffered as a result of this incident."

22. On or about December 8, 2006, Hershey notified Solae that it was terminating the Lot 2 order and would neither accept delivery nor pay for the goods already manufactured.

23. From December 2006 through February 2007, Solae made further attempts to gain Hershey's acceptance of the Lot 2 lecithin manufactured specifically for Hershey, to no avail.

COUNT I

DECLARATORY JUDGMENT

[Liability Regarding Lot 1 Under the United Nations Convention on Contracts for the International Sale of Goods ("CISG")]

24. Solae incorporates by reference all prior paragraphs of this Complaint as if fully set forth herein.

25. Solae seeks a judicial determination that the transaction between the parties for Lot 1 is governed by the Conditions of Sale, which, by their terms, limit any Solae liability for amounts claimed by Hershey to no more than the purchase price paid for Lot 1.

26. An actual and justiciable controversy exists between the parties concerning the parties' respective rights and obligations with respect to damages and

costs claimed by Hershey. Hershey seeks to “hold Solae responsible for all losses suffered as a result of this incident.” Solae disputes Hershey’s legal right to do so. Issuance of the relief requested will resolve this existing controversy.

27. The CISG applies, with exceptions not material here, to contracts for sale of goods between parties whose places of business are in different states that are parties to the CISG. For purposes of the CISG countries are “states.” Both the United States and Canada are participating “state” signatories to the Convention.

28. The CISG governs formation of the contract between Solae and Hershey and the rights and obligations of Solae and Hershey arising there under. The CISG provides the governing body of law for transactions it governs.

29. By the CISG’s terms, the Lot 1 Order Confirmation and Conditions of Sale constitute the parties’ agreement governing this transaction.

30. Under the Conditions of Sale, Hershey’s recovery for any claimed damages is limited to “a refund of the amount of the purchase price paid for the product in respect of which damages are claimed.”

31. Solae is entitled to a declaration that under governing law, Solae is required to pay no more than the purchase price of Lot 1 if found liable for Hershey’s damages and costs.

COUNT II

DECLARATORY JUDGMENT [Liability Regarding Lot 1 Under Delaware Law]

32. Solae incorporates by reference all prior paragraphs of this Complaint as if fully set forth herein.

33. By way of alternative pleading, Solae states that, should the CISG not apply in whole or part, Delaware law applies pursuant to the parties' agreement, as set forth in the Conditions of Sale that govern the Lot 1 transaction.

34. Solae seeks a judicial determination that under Delaware law the Lot 1 transaction between the parties is governed by the Conditions of Sale which, by their terms, limit any Solae liability for amounts claimed by Hershey to no more than the purchase price paid for Lot 1.

35. An actual and justiciable controversy exists between the parties concerning the parties' respective rights and obligations with respect to the damages and costs claimed by Hershey. Hershey seeks to "hold Solae responsible for all losses suffered as a result of this incident." Solae disputes Hershey's legal right to do so. Issuance of the relief requested will resolve this existing controversy.

36. The Lot 1 Order Confirmation and Conditions of Sale constitute the parties' agreement governing this transaction.

37. Under the Conditions of Sale, Hershey's recovery for any claimed damages is limited to "a refund of the amount of the purchase price paid for the product in respect of which damages are claimed."

38. Solae is entitled to a declaration that under governing law, Solae is required to pay no more than the purchase price of Lot 1 if found liable for Hershey's damages and costs.

COUNT III

DECLARATORY JUDGMENT

[Liability Regarding Lot 2 Under the United Nations Convention on Contracts for the International Sale of Goods]

39. Solae incorporates by reference all prior paragraphs of this Complaint as if fully set forth herein.

40. Solae seeks a judicial determination that the transaction between the parties for Lot 2 is governed by the Lot 2 Order Confirmation and Conditions of Sale which, under the CISG, contain the terms and conditions that govern the Lot 2 transaction.

41. An actual and justiciable controversy exists between the parties as Hershey violated the CISG by failing to pay the price for the Lot 2 goods it ordered on the date fixed by and determinable from the contracts of purchase without the need for request by Solae.

42. By the CISG's terms, the Lot 2 Order Confirmation and Conditions of Sale constitute the parties' agreement governing this transaction.

43. Solae is entitled to a declaration that under CISG law the Lot 2 Order Confirmation and Conditions of Sale constitute the parties' agreement governing this transaction.

COUNT IV

**DECLARATORY JUDGMENT
[Liability Regarding Lot 2 Under Delaware Law]**

44. Solae incorporates by reference all prior paragraphs of this Complaint as if fully set forth herein.

45. By way of alternative pleading, Solae states that, should the CISG not apply in whole or part, Delaware law applies pursuant to the parties' agreement, as set forth in the Conditions of Sale that govern the Lot 2 transaction.

46. An actual and justiciable controversy exists between the parties regarding the terms and conditions that govern the Lot 2 transaction.

47. The Lot 2 Order Confirmation and Conditions of Sale constitute the parties' agreement governing this transaction.

48. Solae is entitled to a declaration that under Delaware law that the Lot 2 Order Confirmation and Conditions of Sale constitute the parties' agreement governing this transaction.

COUNT V

**BREACH OF CONTRACT
[Liability Regarding Lot 2 Under the United Nations Convention on Contracts for
the International Sale of Goods]**

49. Solae incorporates by reference all prior paragraphs of this Complaint as if fully set forth herein.

50. Hershey agreed to purchase Lot 2.

51. Hershey breached the Conditions of Sale by wrongfully terminating the contract of purchase and refusing to pay for Lot 2.

52. Hershey violated the CISG by failing to pay the price for the goods it ordered per the terms of the contract of purchase.

53. Hershey violated the CISG by failing to pay the price for the goods it ordered on the date fixed by and determinable from the contracts of purchase without the need for request by Solae.

54. As a direct and proximate cause of Hershey's wrongful termination and breach regarding Lot 2, Solae has been damaged through the loss of business and profit.

55. Under governing law, Hershey's wrongful termination and refusal to pay for Lot 2 order entitles Solae to damages in an amount to be determined at trial.

COUNT VI

BREACH OF CONTRACT [Liability Regarding Lot 2 Under Delaware Law]

56. Solae incorporates by reference all prior paragraphs of this Complaint as if fully set forth herein.

57. Hershey violated Delaware law by failing to pay the price for the goods it ordered per the terms of the contract of purchase.

58. Hershey violated Delaware law by failing to pay the price for the goods it ordered on the date fixed by and determinable from the contracts of purchase without the need for request by Solae.

59. As a direct and proximate cause of Hershey's wrongful termination and breach regarding Lot 2, Solae has been damaged through the loss of business and profit.

60. Under Delaware law, Hershey's wrongful termination and refusal to pay for Lot 2 order entitles Solae to damages in an amount to be determined at trial.

RELIEF

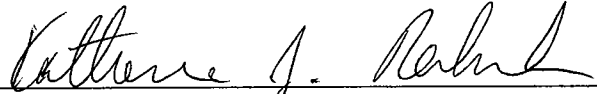
WHEREFORE, Solae respectfully prays for relief as follows:

- a. That the Court declare that the terms and conditions contained in the Conditions of Sale are the terms and conditions that govern the parties' transactions for both Lot 1 and Lot 2;
- b. That the Court declare that amounts to be paid by Solae to Hershey in connection with Lot 1, if any, are limited to no more than the purchase price paid by Hershey;
- c. That the Court find Hershey to have breached its agreement with Solae in declining to pay Solae for Lot 2;
- d. That Solae be awarded its reasonable attorneys' fees and costs as appropriate;
- e. That the Court grant such other and further relief as the Court may deem just and proper.

JURY DEMAND

Solae demands a trial by jury on all issues so triable.

Respectfully submitted,



March 9, 2007

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Attorneys for Plaintiff Solae, LLC

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I.(a) PLAINTIFFS

SOLAE, LLC

DEFENDANTS

HERSHEY CANADA, INC.

(b) County Of Residence Of First Listed Plaintiff New Castle County, DE
(EXCEPT IN U.S. PLAINTIFF CASES)

County Of Residence Of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.
Attorneys (If Known)

(c) Attorneys (Firm Name, Address And Telephone Number)

P. Clarkson Collins, Jr. (#739)
Katherine J. Neikirk (#4129)
Morris James LLP
500 Delaware Avenue, P.O. Box 2306
Wilmington, DE 19899-2306
(302) 888-6800

II. BASIS OF JURISDICTION (PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question (U.S. Government Not a Party)
☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place An "X" In One Box For Plaintiff And One Box For Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|---------------------------------------|--|---------------------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated <i>or</i> Principal Place of Business in this State | <input checked="" type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated <i>and</i> Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input checked="" type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input checked="" type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Property Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury Med. Malpractice <input type="checkbox"/> 365 Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 RR & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt Relations <input type="checkbox"/> 730 Labor/Mgmt Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl Ref Inc Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 420 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities-Employment <input type="checkbox"/> 445 Amer. w/Disabilities-Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from State Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION (Cite The U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 U.S.C. §1331; 28 U.S.C. § 1332

Brief description of cause: Declaratory Judgment, Breach of Contract

VII. REQUESTED IN COMPLAINT ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ CHECK YES only if demanded in complaint JURY DEMAND: ☒ YES ☐ NO

VIII. RELATED CASE(S) IF ANY (See instructions)

JUDGE _____

DOCKET NUMBER _____

DATE

MARCH 9, 2007

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

AO FORM 85 RECEIPT (REV. 9/04)

United States District Court for the District of Delaware

Civil Action No. 07-140

ACKNOWLEDGMENT
OF RECEIPT FOR AO FORM 85

NOTICE OF AVAILABILITY OF A
UNITED STATES MAGISTRATE JUDGE
TO EXERCISE JURISDICTION

I HEREBY ACKNOWLEDGE RECEIPT OF 5 COPIES OF AO FORM 85.

3/9/07

(Date forms issued)

[Signature]

(Signature of Party or their Representative)

Karla Reinbold

(Printed name of Party or their Representative)

Note: Completed receipt will be filed in the Civil Action